

OCT 31 1983

NO. 83-542

SUPREME COURT OF THE UNITED STATES  
ANDER L. STEVAS,  
CLERK

OCTOBER TERM 1983

P. P. LANGFORD, LINDA LANGFORD  
(MRS. JERRY G.) MOORE, DESIREE LYNN  
LANGFORD, MERISSA LAFAWN LANGFORD,  
SHIRLEY LANGFORD,

Petitioners,

VS.

DAVID L. JAMES AND OLLEN JAMES;  
BRUCE WRIGHT, MARY BEN WRIGHT and  
ANNA MAE STOVALL; COMMISSIONERS  
OF THE LAND OFFICE, STATE OF OKLAHOMA;  
UNITED STATES OF AMERICA,

Respondents.

DISPUTE BETWEEN LANDOWNERS ON  
OPPOSITE SIDES OF A RIVER AS TO  
THE BOUNDARY BETWEEN THEIR LANDS

ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS TENTH CIRCUIT

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

CHARLES NESBITT  
125 N.W. 6th St.  
Oklahoma City, OK 73102  
Tel. No. (405) 235-5333  
Counsel for Appellees  
DAVID L. JAMES and  
OLLEN JAMES

## TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
REASONS FOR DENIAL OF CERTIORARI...	9
CONCLUSION.....	18
AUTHORITIES PRESENTED.....	ii

## AUTHORITIES PRESENTED

<u>Arkansas vs. Tennessee,</u>	
246 U.S. 158, 38 S.Ct. 301,	
62 L.Ed. 638 (1918).....	15
<u>Cissna vs. Tennessee,</u>	
246 U.S. 289, 38 S.Ct. 306,	
62 L.Ed. 720.....	15
<u>City of St. Louis vs. Rutz,</u>	
138 U.S. 226, 11 S.Ct. 337,	
34 L.Ed. 941.....	17
<u>Missouri vs. Nebraska,</u>	
196 U.S. 23, 25 S.Ct. 155,	
49 L.Ed. 372.....	15
<u>Nebraska vs. Iowa,</u>	
143 U.S. 359, 12 S.Ct. 396,	
36 L.Ed. 186.....	15
<u>Nolte vs. Sturgeon,</u>	
Okla. 1962, 376 P.2d 616.....	17
<u>Oklahoma vs. Texas,</u>	
256 U.S. 70, 41 S.Ct. 420,	
65 L.Ed. 831 (See Appendix p.16)..	3
<u>Oklahoma vs. Texas,</u>	
258 U.S. 574, 42 S.Ct. 406,	
66 L.Ed. 771.....	2
<u>Oklahoma vs. Texas,</u>	
260 U.S. 606, 42 S.Ct. 221,	
67 L.Ed. 428 (See Appendix p.42)..	3
<u>Oklahoma vs. Texas,</u>	
260 U.S. 606, 43 S.Ct. 221,	
67 L.Ed. 428.....	7

<u>Omaha Tribe vs. Wilson,</u>	
CA8, 1978, 575 F.2d 620.....	17
<u>Oregon vs. Corvallis Sand &amp; Gravel Co.,</u>	
429 U.S. 363, 97 S.Ct. 582,	
50 L.Ed.2d 550.....	16
<u>State vs. Seelke,</u>	
Ok1. 1977, 568 P.2d 650.....	17
<u>Ulhorn vs. U.S. Gypsum Co.,</u>	
CA8, 1966, 366 F.2d 211.....	17
<u>Veatch vs. White,</u>	
CA9, 1927, 23 F.2d 69.....	17
<u>Willett vs. Miller,</u>	
Ok1. 1935, 55 P.2d 90.....	17
<u>Wilson vs. Omaha Indian Tribe,</u>	
442 U.S. 653, 99 S.Ct. 2529,	
61 L.Ed.2d 153.....	17

NO. 83-542

SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM 1983

---

P. P. LANGFORD, LINDA LANGFORD  
(MRS. JERRY G.) MOORE, DESIREE LYNN  
LANGFORD, MERISSA LAFAWN LANGFORD,  
SHIRLEY LANGFORD,

Petitioners,

VS.

DAVID L. JAMES AND OLLEN JAMES;  
BRUCE WRIGHT, MARY BEN WRIGHT and  
ANNA MAE STOVALL; COMMISSIONERS  
OF THE LAND OFFICE, STATE OF OKLAHOMA;  
UNITED STATES OF AMERICA,

Respondents.

---

DISPUTE BETWEEN LANDOWNERS ON  
OPPOSITE SIDES OF A RIVER AS TO  
THE BOUNDARY BETWEEN THEIR LANDS

---

ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS TENTH CIRCUIT

---

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

---

CHARLES NESBITT  
125 N.W. 6th St.  
Oklahoma City, OK 73102  
Tel. No. (405) 235-5333  
Counsel for Appellees  
DAVID L. JAMES and  
OLLEN JAMES

# I

## STATEMENT OF THE CASE

This is a dispute between landowners as to the precise location of the boundary between their respective lands. The land in controversy comprises the river bed of the Red River. Although the river also marks the boundary between Oklahoma and Texas, this is not a dispute between States as to a state boundary.

The disputed land is located within that stretch of the Red River where the Supreme Court has held that land riparian to the Red River on the Oklahoma side extends to the Medial line (halfway between the Oklahoma bank and the Texas bank); riparian land on the Texas side extends only to the Texas bank; and the United States owns the river bed between the Medial line and the Texas bank. (Okla-

homa vs. Texas, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771).

Respondents James own surface rights in part of two sections of land in Jefferson County, Oklahoma, which abut the Red River. Petitioners Langford own lands in Clay County, Texas, abutting the river on the opposite side. The State of Oklahoma ex rel Commissioners of the Land Office, and Intervenor Wright et al own mineral rights under James' land. The United States claimed the strip comprising the south half of the river bed.

From the outset, there was no dispute whatever as to the governing legal principles. The boundary between Oklahoma and Texas, and in turn the boundary between private owners under grants from the respective states, lies along the south (Texas) bank of the Red River. (Oklahoma

vs. Texas, 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831; See Appendix p. 16). The location of that bank in turn dictates the location of the Medial line.

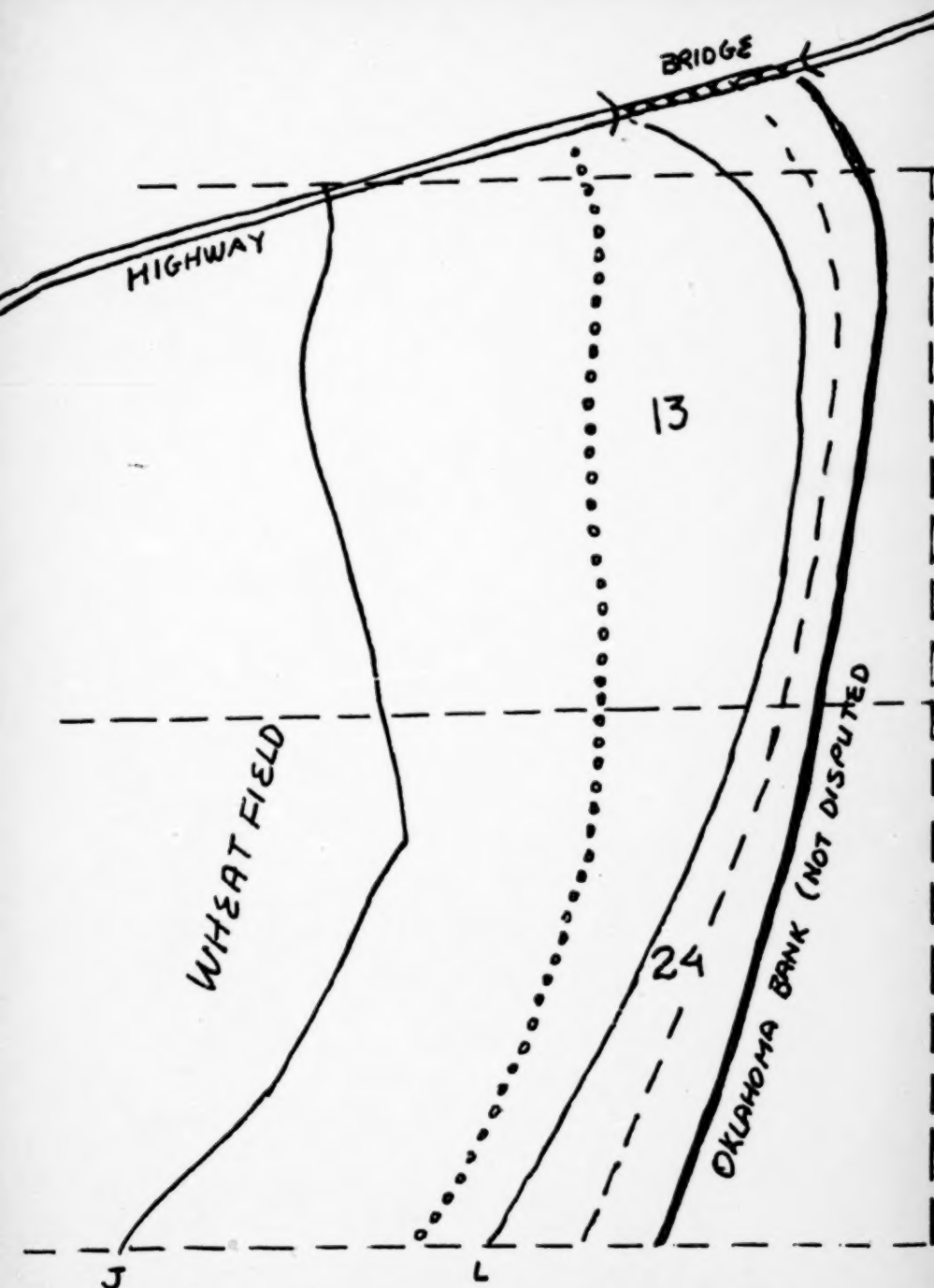
Moreover, there was no dispute as to the standard to be applied in arriving at the location of the boundary bank. (Oklahoma vs. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428; See Appendix p.42). The only issue was one purely of fact: which of several possible choices constituted the correct boundary bank at that point.

The Red River is typical of rivers crossing the more arid Southwest. Unlike an Eastern river, which normally flows substantially bank-full in a well defined channel, the Red River consists of a broad sand-filled bed between well defined outer banks, over which a narrow low water chan-



nel meanders irregularly. (See Appendix pp. 20 et seq). The river utilizes the area between the outer banks in two ways: the low water channel tends to change location rapidly and frequently, so that over a period of years it will successively occupy all points in the river bed; and due to extreme variations in rate of flow, the river occupies the entire bed between the outer banks during substantial high water periods each year. (See Appendix pp. 20, 43).

The issue between the parties was which of two possible banks best fulfilled the definition of the Texas boundary bank as promulgated in Oklahoma vs. Texas, supra. As shown in the accompanying sketch, the low water channel runs along the Oklahoma bank in the disputed area. Langfords asserted that the low sand bank at the edge of the low water channel is



- J — James' West (Texas) Bank  
(Wheatfield Bank)
- L — Langford West (Texas) Bank
- Langford Medial Line
- ooo James Medial Line

the boundary bank; James contended that the permanent bank along the edge of the cultivated wheatfield was the correct boundary.

The District Court conducted a lengthy non-jury trial on the issue, at the conclusion of which it determined that the wheatfield bank is the one which fits the Oklahoma vs. Texas definition. It is relatively permanent, in comparison to the transitory sand bank along the edge of the low water channel; it is part of a continuous bank which contains the braids of the river and marks the outer limits of the meanderings of the low water channel; and it is part of the bank which is washed by the waters of the active channel at multiple points. All of the disputed land below the wheatfield bank is completely inundated several times a year, even during relatively dry years. (558

F. Supp. at 743; Appendix p. 29). The soil in the bed below the wheatfield bank is loose sand, like that in the low water channel. The vegetation is indistinguishable from that which grows throughout the river bed; although periodically destroyed by floods. The 1861 Survey by the State of Texas, the basis of Langfords' title, extended only to the wheatfield bank.

The District Court also applied another principle of law enunciated in Oklahoma vs. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428, that the boundary today is the boundary as it existed in 1821, subject to the doctrines of erosion, accretion and avulsion. Langfords asserted that the disputed area was added to their lands by accretion. The low water channel ran along the wheatfield bank until 1908, when as a result of a major flood, it suddenly moved

about a half mile eastward.

The District Court rejected Langford's accretion claim. The disputed land could not have accreted to Langfords' land because it is not fast land. The river often occupies the entire bed below the wheatfield bank in periods of greater flow short of flood. The designation of the wheatfield bank as the boundary meant that all of the disputed lands lie in the river bed itself. Accordingly, any movement of the low water channel, avulsive or otherwise, within the river bed causes no change in the boundary. Even so, the undisputed evidence established that the movement of the low water channel from its original position along the wheatfield bank was avulsive in character. Thus, even if the edge of the low water channel had been chosen as the boundary, it would remain along the wheatfield bank in any

event because of the avulsive nature of the movement of the channel from that location.

Upon appeal perfected by the Langfords, the Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court, holding that the decision simply required an application of the legal principles enunciated in Oklahoma vs. Texas, supra; that the District Court applied the correct principles, and applied them correctly. (701 F.2d at 126, Appendix p. 10). In a clarifying statement, the appeals court noted that the decision was limited to adjudicating private rights, and was not a determination of a boundary between states.

REASONS FOR DENIAL  
OF CERTIORARI

None of the reasons specified in Rule 17 justifying grant of Certiorari

exists in this case. Nor does there exist any reason of similar nature or of comparable importance. No conflict has arisen between decisions of Federal Courts of Appeals on any issue in this case, or between state and federal courts. There is no such conflict with any decision of this Court. The decision in the District Court and in the Court of Appeals specifically applied and followed the doctrines enunciated in the governing decision by this Court.

This case raises no question of law of sufficient importance as to require a grant of certiorari. This is not to minimize the importance of the case to the parties litigant. It involves ownership of private lands which are valuable and important to each of the claimants. However, there is presented no legal issue which is so new or so novel as to command

review by this Court.

Once a governing principle of law has been promulgated in a decision of this Court, it is for the District Court to apply that principle to the facts of individual cases. It is a proper role of the Court of Appeals to review the decision of a District Court upon disputed issues of fact. Each of those Courts correctly identified the issues and properly carried out its adjudicative responsibility. Hence, under no circumstances can it be asserted that either court so departed from traditional procedure as to call for exercise of this Court's power of supervision.

This case does not involve an "interpretation" of the treaty of 1819. That treaty established the boundary between lands riparian to the Red River, to be the Texas bank of the river. No party



has contended to the contrary. A suit to determine precisely where that bank is located does not involve an interpretation of the treaty.

The standard to be applied in identifying the boundary bank at any particular location is enunciated in Oklahoma vs. Texas, supra (260 U.S. 606) as:

"the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river..."

Petitioners contend the District Court applied the Oklahoma vs. Texas doctrine in such a way that "there could be no adjacent upland" (or lateral valley). The assertion is simply untrue. As the District Court said, (558 F.Supp. at 741):

"To the west of the wheat field is another prominent bank characterized by an outcropping of bedrock rising

some twenty feet above the wheat-field..."

It is clear that the District Court concluded that the wheat field constituted the "lateral valley" which may (but not necessarily does) lie between the boundary bank and the outer edge of the river valley. This bank does not constitute the range of hills fringing the outer edge of the river valley which was found not to constitute the boundary in Oklahoma vs. Texas (260 U.S. at 625).

Petitioners appear to assert some error relating to the gradient boundary survey, (Petition, p.11) referred to in the Oklahoma vs. Texas case (See 265 U.S. 500, 44 S.Ct. 573, 68 L.Ed. 1121). The gradient boundary technique arose out of that part of the decision which designated the actual boundary to be on the Texas bank at mean water level, that is, halfway

between the low water and high water stages. The difficulty in making that measurement upward from a descending water line on a bank that widely varies in height required the invention of a highly specialized survey method. Here, the District Court designated the correct bank, and in its judgment made proper provision for establishing the boundary line on that bank, either by stipulation or court-supervised survey.

The only specific complaint voiced by Petitioners is that the Court of Appeals described the boundary (wheatfield) bank as being three to four feet high, whereas the District Court more accurately described that bank to be approximately ten feet high. In spite of the slight discrepancy, it is clear that both courts were referring to the same bank, and that the Court of Appeals found the District

Court's application of the Oklahoma vs. Texas doctrine to the evidence in this case to have been correct.

The case of Cissna vs. Tennessee, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720 provides no grounds for grant of certiorari. That case was a companion case to Arkansas vs. Tennessee, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1918), a boundary dispute between States over lands in the bed of the Mississippi River, a navigable river, owned by the States in sovereign capacity. By contrast, the Red River is not navigable. (Oklahoma vs. Texas, 258 U.S. at 591). A Tennessee court had held that an avulsion restored the boundary to its location prior to a long process of erosion which preceded the avulsion, contrary to Nebraska vs. Iowa, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186 and Missouri vs. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed. 372.

The boundary dispute between sovereign states, together with the decision by a state court in conflict with the rule in such cases enunciated by the Supreme Court, would justify exercise of appellate jurisdiction. No such grounds exist here.

The doctrine of avulsion was not essential to the decision in this case; for the reason that the bank at the outer edge of the river bed marks the boundary, so that movement of the low water channel, avulsive or otherwise, has no effect on the boundary. In any event, state law governs the determination of rights of owners riparian to a non-navigable river forming a state boundary, Oregon vs. Corvallis Sand and Gravel Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550. Where the United States owns or claims land involved in the dispute, federal law governs the substantive aspects of the

case, but should incorporate the applicable state property law to resolve the dispute. Wilson vs. Omaha Indian Tribe, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153.

Langfords contend that an avulsion can occur only when an identifiable tract of land is cut off (the so-called ox-bow case). Under both the federal rule and the Oklahoma rule, an avulsion also includes a sudden, perceptible change of channel, within or without the river's original bed, such as caused by a flood. City of St. Louis vs. Rutz, 138 U.S. 226, 11 S.Ct. 337, 34 L.Ed. 941; Omaha Tribe vs. Wilson, CA8, 1978, 575 F.2d 620; Veatch vs. White, CA9, 1927, 23 F.2d 69; Ulhorn vs. U.S. Gypsum Co., CA8, 1966, 366 F.2d 211; Willett vs. Miller, Okl. 1935, 55 P.2d 90; Nolte vs. Sturgeon, Okl. 1962, 376 P.2d 616; State vs. Seelke, Okl. 1977,

568 P.2d 650. Since the land in controversy was in Oklahoma prior to movement of the watercourse, Oklahoma law would govern whether ownership changed thereby. Langfords have never contended otherwise.

Thus, even if the decision had depended entirely upon application of the law of avulsion, the rule applied by the District Court was the correct rule under either federal or state law.

#### CONCLUSION

In summary, this case presents no conflict in court decisions, and no issue of federal law justifying a grant of certiorari. For these reasons, it is respectfully submitted that the Court should refuse to grant a writ in this case.

Because of identity of interest,

Respondents (Intervenors) Bruce Wright,  
Mary Ben Wright and Anna Mae Stovall join  
in this Response.

Respectfully submitted,

CHARLES NESBITT  
125 N.W. 6th St.  
Oklahoma City, OK 73102  
(405) 235-5333  
Counsel of Record for  
Respondents  
David L. James and  
Ollen James

Of Counsel:

James F. Howell  
P. O. Box 10798  
Oklahoma City, OK 73140  
Counsel for  
Respondents (Intervenors)  
Bruce Wright, Mary Ben  
Wright and Anna Mae Stovall



# CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, certifies that on the \_\_\_\_\_ day of \_\_\_\_\_, 1983, he deposited three copies of the attached Brief in Opposition to Petition for Writ of Certiorari in the U.S. Mail at the U.S. Post Office, Oklahoma City, Oklahoma with first class postage pre-paid thereon, addressed to each of the following counsel at the address shown:

\_\_\_\_\_  
CHARLES NESBITT

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 1983.

\_\_\_\_\_  
Notary Public

My Commission Expires: 12-7-85

M. C. Kratz, Jr.  
General Counsel  
Commissioners of the Public Land Office  
State of Oklahoma  
4th Floor, Jim Thorpe Building  
Oklahoma City, Oklahoma 73105  
ATTORNEY FOR DEFENDANT-RESPONDENT  
COMMISSIONERS OF THE PUBLIC LAND OFFICE  
STATE OF OKLAHOMA

Solicitor General of the United States  
Department of Justice  
Washington, D.C. 20530

John E. Green  
Assistant U.S. Attorney  
Federal Courthouse  
Oklahoma City, Oklahoma 73102  
ATTORNEY FOR DEFENDANT-RESPONDENT  
U. S. OF AMERICA

Robert M. Helton  
713 Lamar Street  
Wichita Falls, Texas 76301  
ATTORNEY FOR APPELLANT